Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

April 1 to June 30, 2008

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Production Summary

- The active inventory totalled 4,229 (7% over the target of 4,000 cases). This is an encouraging reduction from the previous quarter result of 4,531.

- Incoming appeals numbered 925 and of these, 767 were appeals from WSIB decisions and 158 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 779 new appeals and 158 reactivated appeals recorded in the first quarter of 2008.
  - In the 2nd quarter of 2007 the Tribunal recorded 812 new appeals and 138 re-activations.
  - In 2007, the weekly average of hearing ready appellants was 59. For Q2 2008, the weekly average of hearing ready appellants is 54. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,215; this includes 375 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 840 after hearing dispositions; of the after hearing dispositions, 805 followed from Tribunal decisions.

- In Q2-08, the inactive inventory was 4,085 cases (at the end of Q1-08, the inactive inventory was 4,067 cases).

- In Q2-08, 86% of final decisions were released within 120 days. In 2007, 86% of final decisions were released within 120 days.

- The Tribunal's long term, or "steady state" target is an active inventory of 4,000 appeals; at this level, the Tribunal will once again be able to deliver on its promise of timely processing of appeals with hearing dates offered within four months of the appeal being confirmed as hearing ready. The Tribunal has made steady progress towards this goal; the Q2 active inventory of 4,229 appeals is a significant reduction from a high of 5,491 active appeals at the end of the third quarter of 2006. With this progress in appeal inventory reduction, parties should begin to see significant decreases in the time to schedule hearings by the end of 2008.

- While Tribunal's and WSIB's caseloads may subsequently increase depending upon external factors such as the state of the Provincial economy, if the current downward trend in the number of new appeals from WSIB continues, the Tribunal will likely reach its active inventory target of 4000 active appeals in the first half of 2009.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2008, the notice inventory included 1,245 dormant cases, the active inventory totalled 4,229 cases, and the inactive inventory totalled 4,085 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2006	5318
Q2-2006	5414
Q3-2006	5491
Q4-2006	5225
Q1-2007	5169
Q2-2007	5043
Q3-2007	4954
Q4-2007	4649
Q1-2008	4531
Q2-2008	4229

B. Incoming Appeals

Period	Incoming Appeals
Q1-2006	1144
Q2-2006	1124
Q3-2006	1087
Q4-2006	1007
Q1-2007	1026
Q2-2007	950
Q3-2007	939
Q4-2007	978
Q1-2008	930
Q2-2008	925

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2006	1146	435	711
Q2-2006	1131	477	654
Q3-2006	1083	426	657
Q4-2006	1161	362	799
Q1-2007	1149	383	766
Q2-2007	1132	366	766
Q3-2007	1031	370	661
Q4-2007	1219	427	792
Q1-2008	1173	386	787
Q2-2008	1215	375	840

D. Inactive Inventory

Period	Inactive Inventory
Q1-2006	4310
Q2-2006	4350
Q3-2006	4303
Q4-2006	4235
Q1-2007	4119
Q2-2007	4109
Q3-2007	4073
Q4-2007	4067
Q1-2008	4067
Q2-2008	4085

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56
Q3-2007	1294	-3
Q4-2007	1358	64
Q1-2008	1233	-125
Q2-2008	1245	12

Community Activities

Community activities for 2008 are also noted in the Tribunal's newsletter, In Focus. The newsletter is published twice per year. The current issue is May 2008 and is available at the Tribunal's web site, www.wsiat.on.ca.

On April 4, 2008 Tribunal General Counsel Dan Revington joined safety advocate Robert Ellis for a presentation to 300 high school students at York Memorial Collegiate Institute in Toronto. Robert Ellis is well known across Canada and the United States for his outstanding presentations on health and safety in the workplace for young workers. In 1999, Robert's 18-year-old son David was seriously injured by a machine at work on his second day on the job. David died six days later. Robert used this devastating event to start a crusade for health and safety for young people. He has accepted numerous engagements speaking to students to share his tragic experience and his message for safety awareness in the hopes of preventing injuries to young workers. The hard-hitting presentation was well-received by the students at York Memorial. Dan was pleased to participate in Robert's program by answering questions from the students.

On April 15th WSIAT Executive Director, Marsha Faubert and WSIAT Director of Appeals Services, Debbie Dileo participated in a seminar presented by the Ontario Mining Association in Sudbury. They presented information on The New Era of Paralegals and How it Impacts Employers and Workers.

Dan Revington spoke to the entire staff of the Office of the Employer Adviser (OEA) at the OEA province-wide meeting on May 21. Dan updated OEA staff members about paralegal regulation at WSIAT, decisions of the courts on judicial reviews of Tribunal decisions, and recent appeals at the Tribunal raising the Charter of Rights.

On May 6, Carole Prest and Hal Watson co-chaired a Joint Ontario Bar Association Administrative Law/Municipal Law dinner meeting on Ethics, Administrative Law and Good Government. David Mullan, the Integrity Commissioner for the City of Toronto, as well as a Part-Time Vice-Chair at the Tribunal, and George Rust-D'Eye were the main speakers. Panelists were Chris Williams and Greg Levine. In 2008-2009, Carole Prest will be serving a second term as Past Chair of the Administrative Law Section.

On May 23rd, Gillian Shaw, lawyer in Tribunal Counsel Office, spoke as a member of a panel at the Eastern Region Legal Clinic Conference. The topic for the panel was "To Disclose or not to Disclose: That is the Question". The audience of clinic lawyers and legal workers heard Gillian's talk on legal and ethical obligations when disclosing evidence before administrative tribunals. Her insights into WSIAT practice and procedure were much appreciated by those attending the Conference.

Yolande Lemire, administrative judge with Commission des lesions professionnelles, visited WSIAT offices on May 23rd for a tour. Ms. Lemire shared experiences with other adjudicators working in workplace safety & insurance law.

Marsha Faubert, Susan Adams, Dan Revington, Deb Dileo and Martha Lai have continued to work with Tribunal representatives who have been greatly affected by the

paralegal transition, in particular, individual representatives to confirm their Law Society of Upper Canada status and new, LSUC-compliant company names. Some companies and individuals have not continued representing clients at the Tribunal. Where possible, they have worked with the representatives to identify new representatives for Tribunal clients.

Keep up to date with Tribunal news using an RSS feed! The Tribunal's web site is www.wsiat.on.ca; instructions are located at the bottom of the home page.

Judicial Review Activity

A significant decision in this quarter was the release of the Court of Appeal decision in *Mills v Workplace Safety & Insurance Appeals Tribunal* (Decision 433/99). The Court of Appeal unanimously allowed the Tribunal's appeal from a Divisional Court decision which had quashed a Tribunal decision.

The Court of Appeal decision in *Mills* means that for the nearly twenty-three year history of the Tribunal, there has never been a court decision which finally quashed a decision of the Tribunal. Given that the Tribunal has released well over forty thousand decisions since its inception in 1985, this is a record of which all Tribunal staff and adjudicators may be proud.

Second Quarter 2008

The second quarter of 2008 was extremely busy in regards to judicial review activity. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

The status of applications for judicial review involving the Tribunal for the second quarter of 2008 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and

causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5 2006. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decisions Nos. 433/99* and *433/99R*.

The Divisional Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

The Tribunal filed a Notice of Motion for Leave to Appeal. The Court of Appeal granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau and Killeen). The appeal was heard by the Court of Appeal on February 1, 2008 (Rouleau, Weiler and Watt). The Court reserved its decision.

Following the release of the Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, the Court of Appeal invited the parties to make further submissions. The Tribunal filed further submissions with the Court of Appeal relating to the standard of review pursuant to *Dunsmuir*.

The Court of Appeal decision was released on June 3, 2008. In a unanimous decision, the Tribunal's appeal was allowed. Justice Rouleau, writing for the Court, affirmed that the standard of review of decisions of the Tribunal was now reasonableness. Citing the Supreme Court's decision in *Dunsmuir*, he stated that the existing jurisprudence has established that the highest level of deference applies to Tribunal decisions. The issues on appeal related to findings of fact made by the Tribunal. "These findings fall squarely within the Tribunal's area of experience and expertise and the basis for the findings is articulated in the Tribunal's reasons."

The Court of Appeal held that Divisional Court erred in its analysis of the evidence. There was a sufficient evidentiary basis and a rational basis for the Tribunal's conclusion that the worker's back problems were not causally connected to the 1979 injury: "Neither the reasoning nor the conclusion is unreasonable."

2. Decision No. 855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker.

Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard on June 27.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider evidence of legislative history which were contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Tribunal filed a notice of motion for leave to appeal to the Court of Appeal. In January the Court of Appeal granted leave to appeal (Winkler, Rosenberg and Lang). The Tribunal has filed its factum with the Divisional Court. The Workplace Safety & Insurance Board will be intervening. It is anticipated the appeal will be heard in September.

3. Decisions Nos. 172/02I (February 28, 2002), 172/02 (September 22, 2003) and 172/02R (June 30, 2004)

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss

benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In *Decision 172/02* the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9, 1998. A further request to reconsider for the period benefits was dismissed.

The worker commenced an application for judicial review. The case was heard on October 25 by a Divisional Court Panel of Swinton, Lane and Kitely. The Court reserved its decision.

On January 24 the Divisional Court released its decision, unanimously dismissing the application for judicial review. The Court rejected the Applicant's argument that the Tribunal was required to specifically refer to Board policies which it applied in its decision. The Tribunal's findings of fact were "well reasoned and comprehensive" and not patently unreasonable. A Charter argument raised for the first time on judicial review was dismissed, as the Applicant did not satisfy the onus of demonstrating the Divisional Court should deal with the constitutional arguments.

Owing to the way the case was argued, the Tribunal decided to seek costs. After considering written submissions, the Court accepted the Tribunal's submission for an order of costs against the worker in the amount of $2,000.00.

4. Decisions Nos. 167/06 (March 9, 2006) and 167/06R (December 14, 2006)

The worker's appeal for chronic pain entitlement was denied by the Tribunal. The worker's family doctor had submitted a report suggesting the worker was a malingerer. The Vice-Chair relied on the letter as part of the evidence he considered in denying the appeal.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings with the Court. Following conversations with Tribunal counsel, counsel for the worker was considering whether to bring a further application for reconsideration. The Divisional Court registrar then served a notice that the judicial review would be dismissed if not perfected within ten days. Tribunal counsel telephoned counsel for the Applicant, but the calls were not returned. Counsel for the Applicant served his factum. At the end of the quarter, Tribunal counsel were seeking instructions on the possibility of a further reconsideration.

5. Decision Nos. 893/06 (October 12, 2006) and 893/06R (November 15, 2007)

The worker's short term earnings were calculated based on his earnings of $25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker's appeal that his earnings should be based on $25.00 an hour was dismissed.

The Vice-Chair found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The earnings should be based on the net average earnings, not the actual gross earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker served an application for judicial review. At the end of the quarter the Tribunal was waiting for the Applicant to provide a copy of the transcript of the hearing, to include in the Tribunal's Record of Proceeding.

6. Decision No.1118/07 (January 18, 2007)

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action against his employer. The employer's application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found that although the employer was a federal undertaking, this did not take away the Tribunal's jurisdiction. The *Nuclear Liability Act* did not limit the right to claim compensation.

The plaintiff commenced an application for judicial review. By the end of the quarter the plaintiff, the Tribunal, and the employer had filed their factums. It is expected that this will be heard by the Divisional Court in October. At the end of the quarter the Tribunal was waiting to receive the plaintiff's factum.

7. Decision Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and rib that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged

were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self-represented. The Tribunal served and filed its Record. For reasons which are not clear, the worker has refused to order the transcripts of the hearing or to file a factum.

8. Decision Nos. 207/05 (April 11, 2005) and 207/05R (January 10, 2006)

The plaintiff was injured in a motor vehicle accident. He was sleeping in a tractor-trailer driven by the defendant driver, and owned by the defendant trucking company. The defendants applied to the Tribunal for an order that the plaintiff's right of action was taken away.

The Vice-Chair found both the plaintiff and the defendant driver were workers of the defendant Schedule 1 trucking company, and that they were in the course of employment at the time of the accident. The Vice-Chair held the plaintiff's right of action was taken away.

The plaintiff commenced an application for judicial review more than two years after the Tribunal's reconsideration decision was released.

The Tribunal filed its Record of Proceedings. The defendant respondent has advised that it will be bringing a motion to strike the judicial review for delay. The motion is expected to be heard in August.

9. Decision Nos. 832/04 (November 18, 2004) and 832/04R (April 5, 2007)

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal was denied. The Vice-Chair noted the worker's pre-existing back condition, and the absence of any medical support for the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. At the end of the quarter the Tribunal had filed its Record. This case will be heard in French.

Highlights of Recent Decisions

Mental Stress – Harassment

Decision No. 532/08 (May 01, 2008) (Moore, Christie, Hoskin) is of interest for its treatment of traumatic mental stress as being employment related under Board policy. The worker had been employed by the employer for several years. The employer was verbally abusive to all workers, but particularly so to the worker, and subjected the worker to demeaning remarks. The evidence of independent witnesses indicated that that the worker was singled out for constant and extreme abuse that was not in keeping with the worker's job performance. On the day in question, the worker advised the employer that she was leaving early since she did not feel well. The employer leapt out of his chair, lunged across his desk, pointed a finger at her face, and yelled and swore at her. This incident was a sudden and unexpected traumatic event within the meaning of Board policy. The worker was the object of harassment that included the threat of physical violence.

Occupational Disease and Irrebuttable Presumption – Mesothelioma

Decision No. 1290/02 (April 08, 2008) (E. Smith, Jago, Jackson) is one of the few Tribunal decisions to a consider a Schedule 4 occupational disease. It is of interest for its analysis of asbestos exposure under section 134(10) of the pre-1997 Act and Schedule 4. In this case, the worker died at age 42 from mesothelioma, a condition associated with asbestos. The Tribunal found that the worker's cancer arose from his occupational exposure and work involving the generation of airborne asbestos fibres. The Tribunal noted that s.134(10) and Schedule 4 provide an irrebuttable presumption that the mesothelioma is work-related if a worker is employed in a milling or manufacturing process involving the generation of airborne asbestos fibres. The Tribunal found that the use of asbestos hand pads resulted in the generation of airborne asbestos. In addition, thermocouples used in the plate and specialty department, and the presence of asbestos in the furnace seals also gave rise to airborne asbestos. Based on these exposures, the Tribunal found that the mandatory presumption applied.

SIEF Relief

Decision No. 526/08 (April 01, 2008) (E. Smith) is of particular interest to employers, for its finding that there is discretion in a range of potential awards in the upper category of SIEF relief, between 90-100%. Board policy provides a table for SIEF relief based on the severity of the accident and the medical significance of the pre-existing condition. There is a range of possible awards in the upper category, between 90-100%. While it is not practical or reasonable to attempt to distinguish between very minor differences, such as 93% or 94%, there may be cases where it is appropriate to award SIEF relief in the middle of the range. This was such a case. The worker had two prior and unsuccessful knee surgeries and an arthroscopy. The knee continued to be symptomatic. In the circumstances, the employer was entitled to 95% SIEF relief. The

5% cost impact to the employer was sufficient to reflect the contribution of the workplace triggering event to the worker's injury. The Decision is also useful for its discussion of "cause" under the relevant Board policy, where 100% SIEF relief is awarded.

Loss of Earnings Benefits (LOE) and Occupational Disease after Retirement

Decision No. 1581/06 (April 08, 2008) (Ryan) addresses the question of whether LOE benefits are available to workers who develop an occupational disease after they have permanently retired. The appeal dismissed the worker's claim for entitlement to LOE benefits in these circumstances. The worker was a carpenter who was exposed to asbestos during his work from 1957 until 1987. In August 2003, at age 81, he was diagnosed with mesothelioma, and died in October, 2004. The Tribunal noted that section 43 of the WSIA provides that only workers who have a loss of earnings as a result of an injury are entitled to LOE benefits. The Tribunal found that, except for circumstances where a worker has not withdrawn from the workforce despite retirement, section 43 does not generally provide a basis to compensate injured workers after retirement. LOE benefits are only available to workers who suffer an actual, as opposed to a potential, loss of earnings as a result of an injury or disease. Workers who have retired completely, and have no intention of returning to the workforce, cannot reasonably be considered to have a loss of earnings arising from an injury or disease. While there is no Board policy on entitlement to LOE benefits for workers who develop an occupational disease after retirement, Board practice seemed to be to award benefits under such circumstances. The Tribunal noted, however, that section 43 of the WSIA as currently worded does not authorize such payments.

Occupational Exposure to Cleaning Agents

Decision No. 49/08 (June 19, 2008) (Robeson, Seguin, Broadbent) is of interest for its treatment of exposure to cleaning agents in the employment context, noting that the evidence must establish more than a possibility that the exposure causes the worker's conditions. The appeal dismissed the worker's claim for entitlement to benefits for urticaria, anaphylaxis, angiodema and neuropsychological impairment as a result of exposure to a cleaning agent in her employment from 1990 to 1999. The worker attributed her problems to her exposure to a cleaning agent used in the workplace. The Panel concluded that the worker was not entitled to benefits since the exposure to a cleaning agent did not contribute significantly to her conditions. The Tribunal noted the evidence of exposure and symptom onset was not consistent, and that the preponderance of medical opinion, did not support a causal relationship between exposure and the worker's conditions. The Tribunal noted that while a lack of scientific certainty is not determinative of the causation issue, an inference as to causation cannot be made by demonstrating that there is a possibility of some causal connection. Taking a pragmatic and robust approach to the evidence, on a balance of probabilities, the Tribunal found that the evidence established no more than a possibility that the worker's conditions resulted from her employment. Since the evidence for and against the claim was not approximately equal in weight, the benefit of the doubt did not apply.